STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2002B032

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AUGUSTINE MADRID,

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, STERLING CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on March 25, 2002. Hollyce Farrell, Assistant Attorney General, represented respondent. Complainant appeared in-person and represented himself.

MATTER APPEALED

Complainant appeals a three-day disciplinary suspension. For the reasons set forth below, respondent's action is affirmed.

ISSUES

- 1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
- 2. Whether respondent is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

- Complainant, Augustine Madrid, is a Correctional Officer III for respondent Department of Corrections (DOC), having worked for DOC for twelve years. He serves as a lieutenant at the Sterling Correctional Facility (SCF).
- On October 11, 2000, Madrid was issued a corrective action for deficiencies in his supervision of subordinate staff. He was required to attend the Colorado Supervisory Leadership Program.
- Madrid was the immediate supervisor of Correctional Officer Dollard. On or around August 5, 2001, Dollard removed his watch from his wrist and set it next to his computer in the back of the operations office, then left the room. As a practical joke, Madrid picked the watch up and put it in his pocket. Later, Dollard noticed his watch missing and asked Madrid, his supervisor, if he had it. Madrid indicated that he did not know where the watch was and related words to the effect of, "We might have to shake down the unit looking for it."
- 4. Madrid left with the watch and gave it to an inmate named Claybourne, suggesting that Claybourne show the watch to Dollard and ask him how much he would give him for it. The inmate went into the operations office, where Dollard was, and returned the watch by placing it on the counter.

- On August 29, 2001, following a meeting with lieutenants, two of the lieutenants approached Captain Cox, who was Madrid's direct supervisor, and advised her that Officer Dollard's work performance had gone downhill and that Dollard had become withdrawn and displayed low morale. Cox dispatched one of the lieutenants to talk to Dollard, who reported back to her that Dollard was upset because he had been made the butt of a practical joke by Madrid. Cox then asked to speak to Dollard.
- 6. In Cox's office, Dollard was reluctant to discuss what was bothering him, saying that he did not want to get anybody into trouble. Eventually, he disclosed the August 5 incident concerning his watch.
- 7. Of great significance to Cox was that an inmate had been involved. "What if the inmate had put the watch in his pocket and just walked off?" she asked rhetorically. She referred the matter to the appointing authority.
- 8. To involve an inmate in such a practical joke is a security risk because it gives the inmate power over the correctional officer and enables the inmate to be manipulative, as inmates tend to be.
- Madrid has received DOC training to the effect that correctional officers should keep a professional distance from offenders and avoid close relationships with them.
- 10. Warden and appointing authority Robert Furlong presided over a predisciplinary meeting on September 25, 2001. Madrid expressed his belief that the incident was not a serious matter and was being blown out of proportion.

- 11. In Furlong's view, involving an inmate in a practical joke between staff members compromises the security of the facility because it gives an inmate something on the staff member and may lead to requests for favors from the inmate. In determining the appropriate sanction, he took into account the fact that Madrid had received an earlier corrective action for poor supervisory skills, and the fact that his acts had an adverse affect on employee morale.
- 12. Furlong concluded that Madrid violated DOC Administrative Regulation 1450-2, Staff Code of Conduct, which provides: "Horseplay between staff or staff and offenders is prohibited. Horseplay includes, but is not limited to, such acts as wrestling, pushing, chasing or practical jokes."
- 13. By letter dated October 9, 2001, the appointing authority imposed a three-day disciplinary suspension.
- Complainant filed a timely appeal of the disciplinary action on October
 2001.

DISCUSSION

An appointing authority has the power to hire employees and evaluate job performance and to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, the appointing authority reasonably considered the evidence that he had before him and appropriately determined that a three-day disciplinary suspension was justified. He followed the concept of progressive discipline. See R-6-2, 4 CCR 801. He did not abuse his discretion. See Rules R-6-5, R-6-6, R-6-8, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801.

Substantial evidence supports the findings and conclusions of the appointing authority. Respondent's action was not arbitrary, capricious or contrary to rule or

law. Conclusively, respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. *See Dep't of Institutions v. Kinchen,* 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Additionally, attorney fees should not be assessed against a party who is appearing without an attorney. See C.R.S. §13-17-102(6). Accordingly, this is not a proper case for a fee award. See also R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

- Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law.
- 2. Respondent is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of April, 2002, at Denver, Colorado.

Robert W. Thompson, Jr. Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of April, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Augustine Madrid 315 Hays Avenue, #88 Sterling, CO 80751

And through interagency mail, to:

Hollyce Farrell Assistant Attorney General Employment Section 1525 Sherman Street, 5th Floor Denver, CO 80203